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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/030,966	06/20/2002	Stephen Richard Hellaby	0290-0180P	2811
2292	7590	07/11/2006		
BIRCH STEWART KOLASCH & BIRCH PO BOX 747 FALLS CHURCH, VA 22040-0747				
			EXAMINER BECKER, DREW E	
			ART UNIT 1761	PAPER NUMBER
DATE MAILED: 07/11/2006				

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

**Application No.**

10/030,966

**Applicant(s)**

HELLABY ET AL.

**Examiner**

Drew E. Becker

**Art Unit**

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 02 May 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-3,5-12,14-18,20-24,26-32 and 41-49 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3,5-12,14-18,20-24,26-32 and 41-49 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

**DETAILED ACTION**

***Claim Rejections - 35 USC § 102***

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1-3, 7-12, 14-18, 20-24, 31-32, and 42-48 are rejected under 35 U.S.C. 102(b) as being anticipated by GB 2093679A.

GB 2093679A teaches a dessert coating product comprising a suspension of particles in a carrier liquid, the food particles being in a monomodal range of 1-10 microns (page 1, line 122), the carrier liquid being a mixture of oils (page 1, lines 33-44), a solids content of 35-55% (page 1, line 34), the product inherently having an adhesiveness of at least 90% and viscosity of 50-100 mPa/s, flavor and seasoning components (page 2, line 25), the oil mixture being liquid at 17°C (page 1, line 77), the particles having been milled in a ball mill (page 1, lines 113), and an absence of nuts. Phrases such as “said components have been milled... using a low shear high impact milling method” are merely preferred methods of making the claimed product.

***Claim Rejections - 35 USC § 103***

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and

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the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 5 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over GB 2093679A as applied above, in view of Bourns et al [Pat. No. 5,529,800].

GB 2093679A teaches the above mentioned components. GB 2093679A does not recite a free-flow enhancing agent (claim 5), and the use of plam olein or rapeseed oil (claim 26). Bourns et al teach a food product comprising a free-flow enhancing agent for granulated sugar (column 4, line 38), and the use of palm oil (column 5, line 67) and canola oil (column 6, line 1) which is a type of rapeseed oil. It would have been obvious to one of ordinary skill in the art to incorporate the oils and free-flow agent of Bourns et al into the invention of GB 2093679A since both are directed to dessert compositions, since GB 2093679A already included granulated sugar (page 2, line 24) and oils which need to liquid at room temperature (page 1, line 55), since the palm oil and canola oil of Bourns et al were liquid at room temperature (column 6, line 65), and since the free-flow agent of Bourns et al helped to keep the sugar from clumping (column 4, liens 32-39).

5. Claims 6 and 41 are rejected under 35 U.S.C. 103(a) as being unpatentable over GB 2093679A, in view of Bourns et al, as applied above, and further in view of Myers et al [Pat. No. 5,871,781].

GB 2093679A and Bourns et al teach the above mentioned components. GB 2093679A and Bourns et al do not recite calcium phosphate as the free-flow agent. Myers et al teach a food product comprising a free-flow agent in the form of calcium phosphate (column 10, line 67). It would have been obvious to one of ordinary skill in the art to incorporate the calcium phosphate of Myers et al into the invention of GB 2093679A, in

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view of Bourns et al, since all are directed to food products, since Bourns et al already included a free-flow agent (column 4, lines 32-39), and since calcium phosphate was a commonly used free-flow agent in foods as shown by Myers et al (column 10, lines 63-67).

6. Claims 27-30 and 49 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cabrera et al [Pat. No. 5,362,512] in view of Craig et al [Pat. No. 4,005,225].

Cabrera et al teach a bread improver composition comprising a suspension of particles in a carrier liquid, the particles having a monomodal size of less than 10  $\mu\text{m}$  (column 1, line 55), the carrier liquid being a mixture of oils and emulsifiers (column 1, lines 38-51), an enzyme such as amylase (column 2, line 26), ascorbic acid (column 2, line 30), and the product inherently having an adhesion of at least 85%. Cabrera et al do not recite a free-flow enhancing agent. Craig et al teach a bread improver comprising calcium phosphate (abstract) which was a known free-flow agent. It would have been obvious to one of ordinary skill in the art to incorporate the calcium phosphate of Craig et al into the invention of Cabrera et al since both are directed to bread improver compositions, since Cabrera et al already included ascorbic acid (column 2, line 30), and since Craig et al teach that adding calcium phosphate to ascorbic acid provided improved performance for the bread improver (column 3, lines 11-35).

### ***Response to Arguments***

7. Applicant's arguments filed 4/13/06 have been fully considered but they are not persuasive.

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Applicant argues that GB 2093679A is a “sugar-in oil suspension”. However, applicant clearly defined “sugar-in oil suspension” on page 3 of the specification as: a suspension consisting substantially only of sugar and oil. GB 2093679A taught the use of other ingredients such as 5-20% dried milk powder (page 1, line 42). Therefore, GB 2093679A cannot be considered a “sugar-in-oil suspension”.

Applicant argues that GB 2093679A did not recite an adhesiveness of greater than 90%. However, the product of GB 2093679A inherently possessed this property due to its identical composition to that which is claimed.

Applicant argues that GB 2093679A does not recite a monomodal composition. However, even though GB 2093679A does not specifically use the term “monomodal”, it is clearly taught at page 1, line 120.

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., a uniform particle size) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Applicant appears to be confusing “monomodal” with a uniform particle size (ie all particles of one particular size). However, the claims require a “mean particle size”. A mean is very similar to an average in that half of the particles are larger, and half of them are smaller.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections

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are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

### ***Conclusion***

8. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).


A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Drew E. Becker whose telephone number is 571-272-1396. The examiner can normally be reached on Mon.-Fri. 8am to 4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
DREW BECKER  
PRIMARY EXAMINER

6-30-06